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No. 92-718

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TERRY MORRIS,

Petitioner,

v.

LAWRENCE HILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT LAWRENCE HILL

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QUESTION PRESENTED

1. IS THERE A CONSTITUTIONALLY COGNIZABLE "HARM" UNDER THE EIGHTH AMENDMENT WHERE A PRISON OFFICIAL DEPRIVES AN INMATE OF HIS PRESCRIPTION MEDICINES, THUS PREVENTING THE INMATE FROM REDUCING HIS RISK OF DEVELOPING ACTIVE TUBERCULOSIS BY APPROXIMATELY 90% AND RESULTING IN SEVERE EMOTIONAL DISTRESS TO THE INMATE?

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OPINIONS AND JUDGMENTS BELOW

The Opinion of the Sixth Circuit in *Hill v. Marshall,* Case No. 86-3987, November 4, 1988, reversing and remanding the district court on appeal from the first jury verdict in favor of Defendants, is reproduced at Petitioner's Appendix A-23.

The post-trial Order of the United States District Court for the Southern District of Ohio, Western Division, entering Judgment for Plaintiff on August 3, 1990, is reproduced at Petitioner's Appendix A-16.

The judgment of the United States Court of Appeals for the Sixth Circuit, filed on May 1, 1992, in Case No. 90-3803, is reported as *Hill v. Marshall*, 962 F.2d 1209 (6th Cir. 1992), and is reproduced at Petitioner's Appendix A-1.

The Order of the Sixth Circuit denying Defendant's Petition for Rehearing filed July 23, 1992 is reproduced at Petitioner's Appendix A-28.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 1, 1992 (Petitioner's Appendix A-1). A petition for rehearing was denied on July 23, 1992, (Petitioner's Appendix A-28). The petition for a writ of certiorari was filed on October 21, 1992.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the following constitutional provision: U.S. Const. amend. VIII [1791]

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

In July, 1981, Respondent Lawrence Hill ("Mr. Hill") reacted positively to a PPD tuberculosis skin test, indicating that the tuberculosis bacteria was in his body. The positive result did not signify, however, that Mr. Hill had active tuberculosis in his lungs, but rather that the tuberculin bacteria were in his body and that without prevention they could become active.

In the summer of 1981, the physician for the Hamilton County Jails prescribed that Mr. Hill receive the drug INH, 300 milligrams a day, for one year. If a patient receives INH as prescribed, then the chances of the tuberculosis bacteria turning into active tuberculosis are reduced by approximately 90%. If the patient receives INH for only part of the prescribed one year period, however, he may actually be in worse condition than if he did not receive the INH at all because the tuberculosis bacteria could then become resistant to treatment by INH.

In July of 1981, Mr. Hill began taking his INH for what was supposed to be a one year period. Two months later, however, on October 1, 1981, Mr. Hill was transferred to the Southern Ohio Correctional Facility (''SOCF''). Upon arrival at SOCF, Mr. Hill's INH was confiscated. Mr. Hill's medication was never returned and he was never issued additional medication.

Mr. Hill attempted unsuccessfully to get medication at sick call and at the pill line (where prisoners were supposed to receive daily medications). Mr. Hill complained in writing to Petitioner Terry Morris (''Morris''), then Deputy Superintendent of Treatment at SOCF. Morris ignored Mr. Hill's request for his prescription medicines.

Morris admitted at trial that under his tenure as Deputy Superintendent of Treatment, he was aware of a pervasive pattern of failing to pass out medications to inmates during the time period when Mr. Hill was supposed to be receiving his INH on a daily basis. Morris permitted this pervasive pattern to extend to the point where (1) the pill line was closed on a regular basis; (2) the SOCF pharmacist was not properly filling prescriptions such as Mr. Hill's; (3) prescriptions were written, but paperwork was sometimes not followed up on so that an inmate actually received his medicine; and (4) the head nurse, who wrote Mr. Hill's prescription and to whom Mr. Hill

had complained that he was not receiving his medicine, was engaged in a well-known practice of tearing up prescriptions and altering prescriptions without a doctor's approval.

Despite Morris' knowledge of these life threatening actions taking place under his supervision, he did virtually nothing to correct any of these problems. Indeed, Morris admitted that he may well have referred inmates' complaints about not receiving their prescription medicines to the very nurse who he knew was tearing up prescriptions and altering prescriptions without a doctor's approval.

Morris' deprivation of Mr. Hill's prescription medicines (1) prevented Mr. Hill from utilizing INH to reduce his risk of developing active tuberculosis by approximately 90%, and (2) caused Mr. Hill to suffer severe emotional distress.

Hill filed this pro se § 1983 action on December 20, 1982, alleging that Morris' deliberate indifference to his serious medical needs constituted a violation of the Eighth Amendment. The case went to trial in July of 1986 against Morris and one other prison official, with Hill represented by a court-appointed attorney. The jury returned a general verdict in favor of Morris and the other defendant. Hill moved for judgment notwithstanding the verdict or, alternatively, for a new trial. The district court denied the motion and, subsequently, the United States Court of Appeals for the Sixth Circuit reversed that ruling in November 1988.

Upon remand, the case went to trial in March 1990. At trial, Mr. Hill and another inmate testified about the excruciating mental anguish Mr. Hill suffered as a result of having his prescription medicines taken away. Specifically, Mr. Hill was unable to concentrate, could not sleep, became depressed and began talking to himself in fear that he would die without the anti-tuberculin medicines the prison doctor had prescribed. Dr. William Krall, a board certified physician in both internal

medicine and pulmonary disease, testified that had Mr. Hill received his INH as prescribed, he would have been able to reduce his risk of contracting active tuberculosis by approximately 90%.

In response to special interrogatories, the jury found that Morris had been deliberately indifferent to Mr. Hill's serious medical needs. On this ground, the jury returned a unanimous verdict finding Morris liable to Mr. Hill for $95,000 in compensatory damages and $900,000 in punitive damages.

Morris moved for judgment notwithstanding the verdict or for a new trial and for remittitur of damages. The district court conditionally granted Morris' motion for a new trial unless Mr. Hill would agree to take a remittitur of the entire amount of the punitive damages award. Mr. Hill accepted the remittitur under protest, reserving the right to appeal.

Morris appealed his liability and the denial of his motion for judgment notwithstanding the verdict on various claims of error in August 1990. Mr. Hill cross-appealed the remittitur. These appeals were consolidated before the Court of Appeals for the Sixth Circuit which affirmed the denial of Morris' motion for judgment notwithstanding the verdict. Specifically, the court found that there was ample evidence in the record to support the jury's finding that Morris had been deliberately indifferent to Mr. Hill's serious medical needs resulting in constitutionally cognizable "harm" in that Mr. Hill had been prevented from reducing his risk of developing active tuberculosis by approximately 90% and Mr. Hill had suffered severe mental anguish.

Further, the Sixth Circuit reversed and remanded the trial court's "remittitur" of all punitive damages. The Sixth Circuit found that the district court's decision to set aside the jury award of punitive damages was in effect an erroneous

grant of a judgment notwithstanding the verdict. Morris' conduct, according to the Sixth Circuit, reflected a callous disregard for Hill's constitutional rights that certainly supported a verdict for at least some punitive damages. The Sixth Circuit therefore remanded the case to the district court with instructions to enter an amount of punitive damages that is reasonably supported by the evidence.

REASONS FOR DENYING THE WRIT

Mr. Hill agrees that in order to establish a claim for damages under the Eighth Amendment, a prisoner must demonstrate that he has suffered some harm or injury. Contrary to Morris' representations, however, Mr. Hill demonstrated two constitutionally cognizable injuries at trial that resulted from Morris' deliberate deprivation of Mr. Hill's anti-tuberculin medications.

First, Mr. Hill proved at trial that he suffered severe mental anguish when Morris maliciously deprived him of his prescription medicines, medicines that Mr. Hill had been told could be the difference between life and death.[1] Second, Morris' deliberate indifference prevented Mr. Hill from using INH to reduce his risk of developing active tuberculosis by approximately 90%.

These injuries, alone or collectively, amply support a cognizable harm for purposes of establishing a claim for damages under the Eighth Amendment. Under the circumstances, this is a garden-variety Eighth Amendment case where Morris' only real complaint is that he lost. The case presents no

[1]In his petition, Morris completely omits any reference to Mr. Hill's severe emotional distress. As addressed more fully below, because this injury, in and of itself, is a cognizable harm under the Eighth Amendment, this Court will not need to address the questions sought to be raised by the petition.

important legal question which requires intervention by this Court, nor is there a conflict of decisions with other appellate courts. Moreover, because the decision below turned on the unique facts involved, this case is likely to affect few other litigants. The petition should therefore be denied.

I. There Is No Need To Address The Questions Presented By The Petition Because Mr. Hill Suffered A Constitutionally Cognizable Harm – Severe Emotional Distress – As A Direct Result Of Morris' Deliberate Indifference.

The petition omits any reference to the fact that Mr. Hill proved at trial that he suffered severe mental anguish as a result of Morris' indifference to his serious medical needs.[2] It is only by ignoring Mr. Hill's severe emotional distress that the questions presented by the petition can even be considered.

Mr. Hill concedes that a prisoner must demonstrate that he has suffered some harm in order to establish a claim for damages under the Eighth Amendment. No precedent of this Court, however, stands for the proposition that psychological or emotional harm is not cognizable for constitutional purposes. *Hudson v. McMillian*, __ U.S. __ 112 S.Ct. 995, 1004 (1992) (Blackmun, concurring). Indeed, if anything, this Court's precedent is to the contrary. *Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (recognizing Article III standing for "aesthetic" injury); *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (identifying school children's feelings of psychological inferiority from segregation in the public

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[2]The Sixth Circuit's decision below recognized that Mr. Hill "suffered a great deal of mental anguish. . . ." Petitioner's Appendix at A-11.

schools)). *See also, Carey v. Piphus*, 435 U.S. 247, 263-64 and n.20 (1978); *Hudson*, 112 S.Ct. 995 at 1009 (Thomas, J., dissenting) ("That is not to say that the injury must be, or always will be, *physical*.") (emphasis in original).

Thus, because Mr. Hill proved to the satisfaction of the jury that he suffered a constitutionally cognizable injury — severe emotional distress — it is unnecessary for this Court to even consider the questions presented by the petition.

The lower courts have also consistently recognized emotional distress as a compensable injury in a § 1983 action. *See, e.g., Doe v. District of Columbia*, 697 F.2d 1115, 1124 (D.C. Cir. 1983) ("In other words, plaintiffs are entitled to compensation for any physical injuries, pain and suffering, [and] emotional distress . . . proximately caused by the defendants' unconstitutional conduct."); *Crawford v. Garnier*, 719 F.2d 1317, 1324 (7th Cir. 1983); *Cerjan v. Fasula*, 539 F. Supp. 1226, 1235 (N.D.Oh. 1981); *Rodriguez v. Comas*, 888 F.2d 899, 906 (1st Cir. 1989); *See generally*, Restatement (Second) of Torts §§ 46, 905(b)(1977).

II. Even Assuming *Arguendo* That Mr. Hill's Severe Emotional Distress Is Not A Constitutionally Cognizable Injury, Mr. Hill Still Suffered A Cognizable Injury Under The Eighth Amendment In That Morris' Indifference To His Serious Medical Needs Prevented Him From Utilizing The Medications Prescribed By The Prison Doctor To Reduce His Risk Of Developing Active Tuberculosis By Approximately 90%.

In his petition, Morris argues that Mr. Hill has not sustained a constitutionally cognizable injury because his risk of developing active tuberculosis was not altered by Morris'

indifference in depriving him of his INH medicines. Petition at 10-11. As will be demonstrated below, the factual and legal bases of Morris' argument are erroneous.

First, from a factual standpoint, Morris' deliberate deprivation of Mr. Hill's prescription medicines caused injury to Mr. Hill in that Mr. Hill was deprived of the opportunity to reduce the likelihood of developing active tuberculosis by approximately 90%. In other words, but for Morris' outrageous conduct, Mr. Hill's odds of avoiding the onslaught of tuberculosis would have been 90% better. Moreover, there was evidence at trial that Morris' unconstitutional indifference may have resulted in making the tuberculosis bacteria in Mr. Hill's body resistant to INH, thus further exacerbating the situation.

Second, from a legal standpoint, Morris relies on *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) for the proposition that "the mere possibility of developing a future disease is not a cognizable harm for the purpose of establishing an Eighth Amendment violation. . . ." Petition at 11. *Clemmons* involved a civil rights action arising out of an inmate's involuntary subjection to tobacco smoke. The *Clemmons* Court concluded that the Eighth Amendment would not encompass Clemmons' claim because he "does not have a *serious medical need;* he has alleged no adverse physical symptoms from cigarette smoke different from those suffered by everyone in society."[3] 956 F.2d at 1527 (emphasis in original). The Court did not define "serious medical needs", but instead relied on a number of cases for examples of what constitutes serious medical needs.

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[3]The deliberate indifference standard for medical care requires that the inmate's illness or injury be a "serious" one. *Clemmons*, 956 F.2d at 1527 (citing *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976)).

One such case cited by the *Clemmons* Court provides a definition that is useful in examining the case at bar:

> A medical need is serious if it is 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'

Ramos v. Lamm, 639 F.2d 559, 575 (1980) *quoting Laaman v. Atlgemoe*, 437 F. Supp. 269, 311 (D.N.H. 1977). *Accord, Monmouth County Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987); *Tillary v. Owens*, 719 F. Supp. 1256, 1302 (W.D.Pa. 1989); *West v. Keve*, 571 F.2d 158, 162-63, n.6 (3d Cir.).

This definition reveals why *Clemmons* is inapposite. In *Clemmons*, the prisoner had no prescriptions or doctor's order requiring that he not be exposed to tobacco smoke. Hill, on the other hand, had a doctor's prescription for the INH that Morris deprived him of. Obviously, the prison doctor who prescribed INH to reduce the chances of Mr. Hill contracting tuberculosis felt that Mr. Hill's medical needs were serious. Moreover, in response to answers to special interrogatories at trial, the jury in the case at bar confirmed that Mr. Hill's medical needs were serious.

Morris now asks this Court to rewrite the definition of "serious" such that a doctor's reasoned medical judgment would not be considered. This Court should decline Morris' invitation.

This Court should also decline Morris' invitation (made in the course of discussing the second question presented) to legislate a percentage threshold such that before the increased risk of contracting a deadly disease would be a constitutionally cognizable harm, the inmate would have to prove that

he was more likely than not going to contract the disease. Thus, Morris argues that even if a doctor opines that Mr. Hill has a 50% probability of contracting active tuberculosis as a result of Morris' conduct, Mr. Hill has no constitutionally cognizable injury. Morris relies solely on state common law for this proposition. Petition at 11.[4]

This Court has made it clear, however, that state common law does not control in a § 1983 action. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Burnett v. Grattan*, 468 U.S. 42 (1984). It is only if no federal remedy exists that a court should even consider state common law. *Id.*; 42 U.S.C.§ 1988, *Gordon v. Norman*, 788 F.2d 1194, 1199 (6th Cir. 1986) ("Federal standards govern the determination of damages under the civil rights statutes").

In a § 1983 action involving denial of medical care in violation of constitutional rights, the federal common law is that an inmate is entitled to recover damages for undue suffering or "the threat of tangible residual injury." *Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir. 1976) *cited with approval in Estelle v. Gamble*, 429 U.S. 97, 105 n.11 (1976). Further, "[i]n making this determination the trier of fact should consider the practicalities of the situation including the extent of the injury, the realistic possibilities of treatment, and the *possible consequences* to the prisoner of failing to provide immediate medical attention." *Id.* at 860 n.4 (emphasis added.)

The case of *Clark v. Taylor*, 710 F.2d 4 (1st Cir. 1983) illustrates the consistent federal common law that was correctly applied by the Sixth Circuit in the case at bar. In *Clark*, a prisoner brought a § 1983 action for violation of his constitutional rights against the prison warden and others for their

[4]The petition does not explain why this issue is important enough to warrant review on its own, and there is plainly no conflict between the Circuits.

failure to prevent the exposure of the prisoner to a known carcinogen. After a jury verdict against defendants, defendants appealed, challenging the jury's award of $60,000 in compensatory damages for, *inter alia*, plaintiff's increased risk of developing bladder cancer. The First Circuit Court of Appeals affirmed the district court's award of damages for increased risk based on plaintiff's expert who "testified that because of plaintiff's exposure to benzidine, his risk of developing bladder cancer had increased from one to ten thousand to one in ten." *Id.* at 14.

Clearly, plaintiff did not prove that he had a greater than 50% probability of developing bladder cancer. At most plaintiff's evidence showed he had only a 10% chance of ever developing the disease. Nevertheless, both the district court and the Court of Appeals found plaintiff's increased risk to be compensable under federal law. *See also, Todaro v. Ward*, 565 F.2d 48, 51 (2d Cir. 1977) (duty to epileptic prisoner begins before inmate chokes on tongue); *Glick v. Henderson*, 855 F.2d 536, 539-40 (8th Cir. 1988) (inmates would have an Eighth Amendment claim if they faced a "pervasive risk" of contracting AIDS and prison officials did not "reasonably respond to that risk.").[5]

Finally, in a last ditch attempt to have this Court take interest in the case at bar, Morris claims that "the Sixth Circuit's opinion will open the floodgates to speculative and

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[5]These decisions are correctly decided since the protection of constitutional rights requires that compensation be made for actual injuries. As the D.C. Circuit Court of Appeals has stated:

> [I]n cases involving constitutional rights, compensation 'should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right * * *.'

Halperin v. Kissinger, 606 F.2d 1192, 1208 (D.C. Cir. 1979) (footnotes omitted).

fraudulent claims, [and] will overburden the judiciary leading to a greater drain on limited judicial resources. . . .''. Petition at 6, 11-12.

This standard petitioner's argument was best answered by Justice Blackmun in his concurring opinion in *Hudson v. McMillian*, 112 S.Ct. 995, 1003 (1992) (citations omitted):

> This audacious approach to the Eighth Amendment assumes that the interpretation of an explicit constitutional protection is to be guided by pure policy preferences for the paring down of prisoner petitions. Perhaps judicial overload is an appropriate concern in determining whether statutory standing to sue should be conferred upon certain plaintiffs. But his inherently self-interested concern has no appropriate role in interpreting the contours of a substantive constitutional right.

Morris' cry of ''floodgates'' cannot transform a straightforward Eighth Amendment case into one of national significance. Morris' problem with the decision below is not that it may lead to a flood of future litigation; rather, Morris' real problem is that he cannot accept the well-reasoned judgment of the jury, the district court, and the Court of Appeals.

CONCLUSION

"A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor." Rule 10, Rules of the Supreme Court of the United States. Petitioners have failed to point out any special and important reasons which would compel this Court to review the instant case and from a review of the record and the decision below, it is clear that no such reasons exist. Accordingly, the Petition for Writ of *Certiorari* is not well taken and should be denied.

Respectfully submitted,

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